INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Federal Maritime Commission v. *Seatrain Lines, Inc.*, 411 U.S. 726 — 7, 8, 9, 10, 11, 12, 13

United States v. *Reynolds Tobacco Co.*, 325 F. Supp. 656, certiorari denied, 410 U.S. 964 — 4

Volkswagenwerk v. *Federal Maritime Commission*, 390 U.S. 261 — 7-8, 13

Statutes:

Shipping Act of 1916, Section 15, as amended, 39 Stat. 733, 46 U.S.C. 814 — 2, 4, 5, 6, 7, 8, 9, 12, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-345

R. J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is not yet officially reported. The Report and Order of the Federal Maritime Commission (Pet. App. 1b-181b) are reported at 16 F.M.C. 134.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1974. The petition for a writ of certio-

rari was filed on September 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

R. J. Reynolds Tobacco Co. owns Sea-Land Service, Inc., the world's largest containership operator. It sought Federal Maritime Commission permission to acquire United States Lines, Inc., the second largest containership operator. The Commission approved the acquisition on condition that Reynolds operate its two subsidiaries as competitors, and that it submit any arrangements between them for Commission approval. The questions presented are:

(1) Whether the conditions upon which the Commission approved the merger constituted a cooperative working arrangement which the agency had jurisdiction to approve under Section 15 of the Shipping Act, 1916.

(2) If so, whether by imposing this condition the Commission acquired jurisdiction over the underlying acquisition.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, is set forth at Pet. App. E.

STATEMENT

1. Petitioner Sea-Land Service, Inc. ("Sea-Land") is the world's largest operator of containerships.[1] Its stock is owned by a wholly-owned subsidiary of petitioner R. J. Reynolds Tobacco Company ("Reynolds"), which itself is wholly owned by R. J. Reynolds, Inc., a large diversified firm. United States Lines, Inc. ("USL"), is owned by Walter Kidde & Company, another diversified firm; USL is the world's second largest containership operator and the only direct competitor of Sea-Land in total United States foreign commerce (Pet. App. 8a, 9a).

In 1969, Sea-Land and USL and their corporate parents entered into an agreement that provided in

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[1] The difference in the carriage of cargo by containership and by conventional breakbulk vessels is described as follows in the opinion below (Pet. App. 8a, n. 4).

> There are two methods of shipping cargo by water. When conventional breakbulk vessels are used, the articles in the cargo are packed separately, shipped by truck and/or rail to the port, unloaded from the truck or rail car, and finally loaded onto the ship and stored separately in the hold. Upon arrival at the port of destination, the process is repeated in reverse.
>
> Carriage by containership, on the other hand, permits door-to-door delivery of large quantities of separate articles packed in large sealed containers. These containers, which are generally of heavy construction in 20, 30 or 40 foot lengths, are usually packed at the shipping point of origin, then loaded onto trucks or rail cars which transport them to containerships which carry them to the port of destination. On arrival the containers are unloaded and the contents are transported, still in their original containers, to the designated destination.

substance for the charter to Sea-Land of USL's entire containership fleet and complementary equipment for 20 years, with an option to purchase at the end of the charter period (Pet. App. 1c-99c). Before the Commission decided whether to approve the charter agreement, the parties changed the transaction. In 1970, the parties transformed the proposed charter agreement into a stock acquisition agreement (the "merger agreement") which provided in effect that: (1) a wholly-owned subsidiary of Reynolds would acquire from Kidde for $65 million the stock of USL, thus placing under the common ownership of Reynolds both Sea-Land and USL; (2) USL's containerships would be chartered to Sea-Land after the stock acquisition was completed. In a related agreement (the "supplemental agreement"), Reynolds guaranteed to pay Kidde the $65 million purchase price even if the proposed acquisition was barred by agency or court action. Under the supplemental agreement the parties provided for an alternative disposition of USL in the event that the merger could not be consummated.[2]

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[2] In December 1970, the United States filed an antitrust action in the United States District Court for the District of New Jersey to enjoin the merger and supplemental agreements on the ground that they violated the antitrust laws. The Federal Maritime Commission intervened, seeking to stay or dismiss the action on the ground that it had primary jurisdiction over the agreements. The court refused to dismiss, holding that Section 15 does not give the Commission jurisdiction over merger agreements. *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D. N.J.), certiorari denied, 410 U.S. 964. Subsequently, the parties consented to entry of a preliminary injunction barring implementation of

2. After extensive hearings, the Commission's Chief Administrative Law Judge held, on the issue of jurisdiction, that he was bound by the Commission's prior rulings that Section 15 gave the Commission jurisdiction over the merger agreement (Pet. App. 45b), but recommended disapproval as contrary to the public interest (Pet. App. 86b).

During final oral argument before the Commission, on exceptions to the Law Judge's recommendation, Reynolds' counsel for the first time suggested a third and different arrangement (Pet. App. 10a). He proposed that if Reynolds were allowed to acquire USL, Reynolds would operate USL as an independent company in competition with its other subsidiary, Sea-Land, and that any cooperative working arrangements between USL and Sea-Land would not be undertaken without the approval of the Commission.

After inviting comments from the parties, the Commission, by a 3-2 vote, approved an arrangement which was in essence the one proposed by Reynolds' counsel (Pet. App. 10a). Under this arrangement, Reynolds would acquire USL but, instead of chartering USL's fleet to Sea-Land, Reynolds would be required to operate USL independently and in competition with Sea-Land, and would be subject to various conditions designed to prevent the two subsidiaries from acting in concert except as permitted by the Commission (Pet. App. 10a-11a, 31a-34a). The Com-

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the merger and supplemental agreements. The action is still pending in the district court.

mission held that it had jurisdiction over the transaction and approved it (Pet. App. 1b-170b), with two Commissioners dissenting on the merits (Pet. App. 171b-177b) and one on jurisdiction (Pet. App. 3b, n.).

3. The court of appeals reversed. It ruled that the Commission lacked jurisdiction under Section 15 to approve the acquisition. It first held that agreements over which the Commission has jurisdiction under Section 15 are distinguished by at least three features: (1) ongoing obligations between separate carriers; (2) conditions that do not affect ownership of the parties to the agreement, but "envision the continued existence of the parties," thus excluding mergers, consolidations and acquisitions; and (3) agreement between parties subject to the Act, not a unilateral undertaking by a single party (Pet. App. 17a-19a). It next ruled that "the merger is a substantial and principal feature of the transaction. Regardless of what label may be attached to the remainder of the so-called agreement (or undertaking), and regardless of the Commission's possible jurisdiction over that remainder, the merger portion of the agreement is not within the Commission's jurisdiction" (Pet. App. 20a-21a).

The court reasoned that "after the acquisition, a single corporation will own and control both USL and Sea-Land, whereas prior to the acquisition two independent intercorporate structures existed—USL under the ultimate control of Kidde and Sea-Land under the ultimate control of Reynolds. No ties existed

between these two corporate families * * *. After the acquisition only one intercorporate structure would remain. Sea-Land and USL would be subsidiary corporations under the ultimate control of a single company, Reynolds" (*id.*, at 21a). It noted that the legislative history of the Shipping Act indicated that " 'consolidations * * * through stock control of subsidiaries' was one of the evils which Congress sought to avoid by regulating cooperative agreements" (*id.*, at 21a-22a; footnote omitted).

The court further held that the Commission-imposed conditions which were claimed to bring the entire acquisition within the Commission's jurisdiction did not themselves constitute the kind of cooperative working agreements between carriers covered by Section 15 (*id.*, at 25a-29a).

The court vacated the order approving the agreement as modified by the Commission and directed the Commission to remove the agreement from its docket (*id.*, at 30a).[3]

ARGUMENT

Section 15 authorizes the Commission to approve, and thereby to immunize from the antitrust laws, a broad range of working agreements between common carriers by water. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726; *Volkswagenwerk* v. *Federal Maritime Commission*, 390

[3] The Commission has not petitioned for review of this judgment but it has filed a memorandum in support of Reynolds' petition.

U.S. 261.[4] Petitioners concede, as they now must in the light of this Court's decision in *Seatrain*, that an arrangement for the acquisition by one carrier of another carrier's assets that does not require or contemplate any further joint action by the parties, is not subject to the Commission's jurisdiction under Section 15 because it is not a cooperative working agreement. Petitioners contend, however, that under *Seatrain*, the Commission has jurisdiction to approve, and thus to immunize from the antitrust laws, an acquisition agreement that requires further joint action and imposes ongoing obligations on the parties. The Reynolds' acquisition, they say, meets these requirements and thus the court below misapplied *Seatrain*.

The ruling below, we submit, is a correct and logical application of this Court's reasoning in *Seatrain*. Moreover, the "ongoing obligations" upon which petitioners rely are not themselves working agree-

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[4] Agreements specified in Section 15 are those—

(1) fixing or regulating transportation rates or fares;

(2) giving or receiving special rates, accommodations, or other special privileges or advantages;

(3) controlling, regulating, preventing, or destroying competition;

(4) pooling or apportioning earnings, losses, or traffic;

(5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

(6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

(7) or in any manner providing for an exclusive preferential, or co-operative working arrangement.

ments between carriers covered by Section 15. Hence, the issue on which petitioners seek review is not presented on this record.

1. Petitioners' contention that the court below misapplied *Seatrain* rests on the assumption that the conditions upon which the Commission approved the acquisition are working arrangements between persons subject to Section 15. This assumption is incorrect. The undertaking that USL and Sea-Land compete with each other (notwithstanding that they would both be wholly-owned subsidiaries of Reynolds) amounts to nothing more than a mutual commitment to behave competitively as separate entities and to submit any agreements between them concerning their competitive relations to the Commission for approval under Section 15. But, as the court below pointed out, "[w]e perceive no difference between these conditions and the general requirement of section 15 that all carriers submit cooperative working arrangements for Commission approval. * * * [T]he 'agreement to compete' * * * in reality imposes no additional obligations on USL and Sea-Land that are not already imposed by section 15 and the antitrust laws" (Pet. App. 26a).

Moreover, the so-called "agreement" is, in reality, an undertaking between Reynolds and the Commission, rather than between USL and Sea-Land. It is Reynolds that has undertaken, as the condition of obtaining the Commission's approval, to operate its wholly-owned carriers, USL and Sea-Land, as independent and competitive entities. It is, therefore, not

an agreement between two entities subject to Section 15.

The acceptance of the conditions by Kidde, the firm selling USL, is insignificant. Once the acquisition is approved, Kidde will have no "ongoing" obligations, since there is nothing in the conditions which requires Kidde to do anything or refrain from doing anything. Thus, this record does not present petitioners' claim that an acquisition coupled with a genuine on-going agreement may be exempted from the antitrust laws by Commission approval.

2. Petitioners' claim stands the rationale of *Seatrain* on its head. In that case this Court discerned from Section 15's history a legislative purpose to avoid permanent and irretrievable changes in ownership by permitting independent and competing shipping lines to join together, with government approval, in conferences to regulate their competitive behavior (411 U.S. at 736-739). In that way, the on-going conference of independent and competing carriers, although perhaps eliminating competition with respect to rates, would still leave room for competition in other areas and would avoid rate wars which would ultimately mean the elimination of many shipping lines through failure or consolidation. The shipping industry would continue to consist of a number of separate and independent carriers, operating to the maximum extent possible within traditional free enterprise concepts.

Congress, however, did not permit agency approval of those arrangements that have the immediate ef-

fect of altering the competitive structure of the industry through the merging into common ownership of two formerly separately-owned carriers. The latter arrangements remain subject to the antitrust laws.

Seatrain summarized the congressional purpose in these words (411 U.S. at 738-739):

> Thus, the Committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it feared that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition of assets agreements that would result from unregulated rate wars. It is readily apparent that the Commission's reading of the statute would frustrate this legislative purpose. The Committee gave the Commission power to insulate certain anticompetitive arrangements in order to prevent outright mergers. Yet the Commission would have us construe this authority in such a way as to allow it to shield the mergers themselves—the very thing which Congress intended to prevent.

Petitioners distort this reasoning when they contend that, despite *Seatrain*, the Commission may nevertheless authorize a merger where some ancillary arrangement of an ongoing nature is incorporated into the merger transaction. Such ancillary arrangements neither alter the basic character of the transaction nor make less applicable the considerations which this Court found led Congress to define the

Commission's jurisdiction under Section 15 to exclude acquisitions, mergers or consolidations.

Seatrain's holding that an acquisition agreement "which creates no ongoing obligations" is not an "agreement" within Section 15 did not by negative implication declare that an acquisition to which "on-going" obligations are attached is necessarily subject to Section 15. The Court was simply dealing with the transaction before it. The *Seatrain* transaction involved only a single discrete event, the purchase of one carrier's assets by another. It did not involve any on-going or continuing relationship between the parties. The references to "ongoing" and "continuing" were therefore all that were necessary, as the court below pointed out (Pet. App. 15a), to distinguish the transaction in *Seatrain* from cooperative working agreements within Section 15. As the court below added (Pet. App. 16a):

> But the court's language does not require that every agreement which includes some ongoing characteristic is subject to section 15. Whereas all agreements subject to section 15 must be ongoing and continuing in nature, not every on-going and continuing agreement, or agreement with such consequences, is necessarily subject to the statute. Otherwise, an outright merger or sale of assets could be structured to include some ongoing aspect for the sole purpose of obtaining antitrust shelter under section 15. For example, a merger or sale of assets agreement could provide that the transaction would occur in installments over a period of years. This arrangement would be ongoing and continuing, but it

would not necessarily be a section 15 agreement. [Footnote omitted.]

Indeed, this Court, while confining its holding in *Seatrain* to the facts before it, suggested limits to the Commission's jurisdiction when it declared that "Congress intended to vest the Commission with jurisdiction over only those agreements, or those portions of agreements, which created ongoing rights and responsibilities * * *." *Seatrain, supra,* 411 U.S. at 729. This carefully phrased description shows that when an agreement provides for an acquisition and also gives rise to an on-going relationship between carriers, the Commission may have jurisdiction under Section 15 over "those portions of agreements" that provide for the ongoing relationship. That jurisdiction, however, extends "over only * * * those portions" of the agreement creating that relationship, not the acquisition itself. Cf. *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, 291, n. 7 (concurring opinion).

The Commission may not assume jurisdiction over an acquisition merely because some working arrangement covered by Section 15 is incorporated into the acquisition agreement or is included by virtue of conditions the Commission requires. Conversely, the Commission is not necessarily deprived of jurisdiction to pass upon a *bona fide* working arrangement merely because it is incorporated into an acquisition agreement.[5]

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[5] The Commission (FMC Memo., pp. 8-9) and petitioners (Pet., pp. 11-13) suggest that the decision below places an unwarranted limitation on the Commission's power to modify

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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agreements subject to Section 15. Their suggestion assumes (1) that the agreement originally filed with the Commission —the charter agreement—was "fully subject to the Commission's jurisdiction" (FMC Memo., p. 8) and (2) that the agreement as filed, rather than the one actually approved, determines the Commission's jurisdiction. In the first place, as the court below noted with respect to Sea-Land's original agreement to charter USL's entire containership fleet and complementary equipment for a period of 20 years, "a charter of all assets for an extended period might be treated for jurisdictional purposes as an acquisition of assets, especially if the charter is coupled with an option to purchase. Cf. *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153, 181-183 (S.D.N.Y. 1960)" (Pet. App. 29a, n. 27). Thus, the assumption that the charter agreement was "fully subject to the Commission's jurisdiction" is unwarranted. Indeed, in its district court suit the United States challenged the Commission's jurisdiction over the charter agreement (see note 2, *supra*, p. 4). Secondly, as the court pointed out (Pet. App. 29a), the determination of the Commission's jurisdiction on the basis of the agreement originally filed "would allow the Commission to take jurisdiction over one agreement, transform the agreement into an outright merger and then approve the outright merger. This circuitous procedure would enable the Commission to escape the Supreme Court's holding in *Seatrain* that the Commission lacks jurisdiction over outright mergers."

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